

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES S. GARNETT,

Case No. C05-1438MJP

Petitioner

V.

RICHARD MORGAN,

**ORDER GRANTING
PETITIONER'S HABEAS
PETITION**

Respondent.

RICHARD MORGAN,
Respondent.

13 This matter comes before the Court on Petitioner James Garnett's objections to
14 Magistrate Judge Benton's Report and Recommendation rejecting Mr. Garnett's habeas petition.
15 The Court, having reviewed the petition for a writ of habeas corpus (Dkt. No. 4), the Report and
16 Recommendation of Monica J. Benton, United States Magistrate Judge (Dkt. No. 17),
17 Petitioner's objections to the Report and Recommendations (Dkt. No. 20), the Government's
18 response (Dkt. No. 22), Petitioner's reply (Dkt. No. 44), the parties' supplemental pleadings, and
19 the balance of the record, does hereby ORDER:

- 20 (1) The Court ADOPTS IN PART AND DECLINES TO ADOPT IN PART the
21 Report and Recommendation;

22 (2) James Garnett's petition for a writ of habeas corpus is GRANTED. Mr. Garnett's
23 conviction in Skagit County Superior Court Case No. 99-1-00636-3 is
24 VACATED; and

25 (3) Execution of this Order shall be STAYED for thirty (30) days. The STAY shall
26 remain in effect until **February 25, 2008**.

ORDER — 1

1 BACKGROUND

2 The Court's discussion of the facts is limited to those necessary to resolve Mr. Garnett's
3 objections to Magistrate Judge Benton's Report and Recommendation and to address the merits
4 of his habeas petition.

5 Petitioner James Garnett is currently incarcerated at the Washington State Penitentiary in
6 Walla Walla, Washington, where he is serving a life sentence without the possibility of parole. He
7 was convicted in August 2007 on a charge of aggravated first degree murder. He has filed a
8 petition for federal habeas relief under 28 U.S.C. § 2254, challenging the validity of his
9 conviction.

10 On direct appeal, the Washington Court of Appeals summarized the facts of Petitioner's
11 case as follows:

12 Dan Diorio, a 34-year-old mentally ill man, was last seen alive on Tuesday, September
13 14, 1999. That day, Diorio took six bottles of Heineken beer and went out drinking
14 with James S. Garnett, a man Diorio called his "buddy." According to Garnett and
several others, Diorio and Garnett drank beer together at Evelyn's Tavern that day.
15 While there, Diorio flashed a roll of cash. Diorio regularly carried with him up to
\$10,000 in cash and often counted that money in public. Garnett said that he left
Diorio at Evelyn's. A bartender at Evelyn's, however, saw Diorio leave the tavern
with Garnett and a woman.

16 On October 28, 1999 — six weeks later — Diorio's body was discovered in a shallow
17 grave. Diorio had been shot twice in the head and had no money on him. Near
18 Diorio's body, there were 18 beer bottles and cans, including one Heineken beer
bottle. A pathologist estimated that he had been dead two to three weeks.

19 Garnett, who regularly paid his rent late, had receipts for several money orders dated
20 the day Diorio was last seen alive. Although Garnett initially cooperated with the
police, that cooperation was short-lived.

21 On November 19, 1999, the State charged Garnett with first degree murder. After
receiving additional information about the crime from Garnett's wife, the State
22 amended the charge to aggravated first degree murder.^[1]

23 (Dkt. No. 12, Ex. 5 at 2-3.)

24

25 ¹ That same day, the State charged Garnett's wife, Kimberley [sic] Garnett, with
26 aggravated first degree murder. Skagit Co. Sup. Ct. No. 99-1-00687-8. Her case was tried
separately.

1 Throughout the trial, the trial court required Mr. Garnett to wear a knee brace under his
 2 pants, which caused him to walk with a limp as though his knee were stiff. (Dkt. No. 12, Ex. 28
 3 at 106.) He objected to having to wear the knee brace in front of the jury, contending that it
 4 violated his right to a presumption of innocence. The trial court overruled his objection and
 5 stated that there “is a security concern when you have a case of this magnitude” (Id.)

6 The prosecution introduced into evidence audiotapes that contained recorded statements
 7 made by Ms. Garnett, who did not testify at trial, to Kristine Stafford, the State’s key witness.
 8 Ms. Stafford had helped police in the investigation of the murder of Mr. Diorio by wearing a body
 9 wire and prompting Mr. Garnett’s wife to talk about the murder. During cross-examination, the
 10 prosecution asked Mr. Garnett’s mother if she was aware that Mr. Garnett described in the
 11 recorded statements how Mr. Garnett killed the victim:

12 Q: Are you aware that your daughter-in-law described how your son killed
 Mr. Diorio?
 13 A: No.
 14 Q: You weren’t aware of that?
 15 A: No.

16 (Id., Ex. 35 at 1402-03.) Mr. Garnett moved to strike the question and for a mistrial because
 17 none of the recorded statements described how he killed the victim. The trial court granted his
 18 motion to strike and denied his motion for a mistrial. The trial court gave the following
 19 instruction to the jury: “Defense counsel’s objection is sustained. And the last question and
 20 answer are stricken. You are instructed to disregard them.” (Id. at 1408.)

21 The prosecution submitted into evidence a letter Mr. Garnett wrote to his wife in which he
 22 expressed frustration that Ms. Garnett made statements to an informant and expressed confidence
 23 in his defense attorney. (Id., Ex. 33 at 1082, 1093-94.) The prosecution argued that the content
 24 of the letter was indicative of guilt. Mr. Garnett’s motion to suppress the letter was denied.

25 One week into Mr. Garnett’s trial, Mr. Garnett, through his defense counsel, conducted
 26 his first and only interview of Ms. Stafford. (Id., Ex. 13 at Appx. 4.) During the interview,
 27 defense counsel asked Ms. Stafford about any benefits she had received for her assistance. (Id. at

1 8.) Before she could answer, the prosecutor interjected and stated that the State had quashed
2 four warrants. (Id.) Ms. Stafford never answered the question herself.

3 Defense counsel also asked Ms. Stafford if she was using drugs when she wore the wire.
4 Ms. Stafford replied “yes” and stated that she was using at least a “gram a day” of
5 methamphetamine during this time. (Id. at 2.) Defense counsel asked her where she lived and Ms.
6 Stafford replied that she recently moved back to Sanford, Michigan.

7 Three days after Ms. Stafford’s interview, Mr. Garnett’s counsel moved for dismissal
8 pursuant to State Court Rule 8.3(b), alleging that the State had withheld information that it was
9 required to disclose from the defense. (Id., Ex. 33 at 1005-1022.) Among other things, Mr.
10 Garnett’s counsel argued that the State failed to inform defense counsel that Ms. Stafford was
11 using drugs at the time she wore the wire. Defense counsel also alleged that the State failed to
12 update witness lists with current contact information. After hearing extensive arguments from the
13 parties, the trial court denied Mr. Garnett’s motion to dismiss. (Id. at 1044.)

14 In closing arguments, the prosecution stated that Ms. Stafford “got some warrants
15 quashed” and “got extradited from Montana from the time she wore the wire until the time she
16 testified.” (Id., Ex. 36 at 1536.) The prosecution claimed that Ms. Stafford “didn’t get anything
17 from law enforcement” and “she didn’t get anything from the prosecution.” (Id.) On November
18 20, 2001, over a year after Mr. Garnett’s trial, Ms. Stafford received a \$5,000 reward from The
19 Carole Sund/Carrington Memorial Reward Foundation for her assistance in the investigation and
20 her testimony at trial.

21 After testimony concluded, the trial court instructed the jury that they could convict Mr.
22 Garnett on either premeditated first degree murder or felony first degree murder but that all
23 twelve jurors did not have to agree on one alternative in order to return with a guilty verdict.
24 The jury found Petitioner guilty of aggravated first degree murder, and the court sentenced him to
25 life imprisonment without the possibility of parole.

26 Petitioner appealed to the Washington Court of Appeals, which affirmed his conviction.
27

1 (Id., Ex. 2.) His subsequent motion for reconsideration was denied (id., Exs. 6, 7), as was his
2 petition for review in the Washington Supreme Court. (Id., Ex. 10.) On February 11, 2004,
3 Petitioner filed a Personal Restraint Petition (“PRP”) in the Washington Court of Appeals. (Id.,
4 Ex. 12.) The court dismissed the PRP. (Id., Ex. 16.) Petitioner filed a motion for
5 reconsideration, which was forwarded to the Washington Supreme Court and treated as a motion
6 for discretionary review. (Id., Exs. 17, 18.) Petitioner filed an actual motion for discretionary
7 review in the Supreme Court together with a motion asking that he be permitted to supplement
8 the existing record. (Id., Exs. 19, 20.) Although Petitioner’s motion to supplement was granted,
9 his motion for discretionary review was subsequently denied. (Id., Exs. 21, 23.) Petitioner’s state
10 collateral review by way of the PRP became final June 15, 2005.

11 Petitioner filed the instant petition for writ of habeas corpus pro se on August 26, 2005.
12 (Dkt. No. 4.) In the petition, he claimed nine grounds for relief: (1) denial of his right to confront
13 witnesses against him by the State’s use of his wife’s taped-recorded statements; (2) denial of his
14 right to a presumption of innocence and right to a fair trial when he was forced to wear restraints
15 in the presence of the jury; (3) denial of his right to counsel by the State’s use of a letter to his
16 wife describing a conversation with his attorney; (4) denial of his right to due process by
17 prosecutorial misconduct; (5) denial of his right to due process by governmental mismanagement
18 and abuse of discretion by the trial court; (6) denial of his right to a fair trial by an impartial jury
19 because the State was relieved of the burden of proving every element of the crime charged; (7)
20 denial of his right to a speedy trial and due process when the State amended the charges eighteen
21 days before trial; (8) denial of his right from unlawful searches and seizures; and (9) denial of his
22 due process rights by the cumulative effect of numerous errors. (Id.)

23 After Respondent filed an answer and Petitioner filed a reply, Magistrate Judge Benton
24 issued a Report and Recommendation (“R&R”) on April 24, 2006. (Dkt. No. 17.) In the R&R,
25 Magistrate Judge Benton found that Petitioner had not properly exhausted his seventh or ninth
26 grounds for relief. (Id.) She also found that Petitioner failed to state a cognizable habeas claim
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1 with respect to his eighth ground for relief. (*Id.*) With respect to the other six grounds,
2 Magistrate Judge Benton denied them on their merits. Accordingly, Magistrate Judge Benton
3 recommended that the petition be dismissed with prejudice.

4 After the R&R issued, Petitioner filed a motion for appointment of counsel. On
5 September 29, 2006, this Court granted his motion and counsel was subsequently appointed.
6 (Dkt. Nos. 27, 28.) Counsel prepared and filed the objections to the R&R. The matter is now
7 ready for review.

8 DISCUSSION

9 I. Standard of Review - Writ of Habeas Corpus

10 The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. § 1214 (1996)
11 (“AEDPA”), applies to this petition for habeas corpus because it was filed after April 24, 1996.
12 See Lindh v. Murphy, 521 U.S. 320, 326 (1997). Under AEDPA, a writ may issue only if the
13 state court’s ruling “resulted in a decision that was contrary to, or involved an unreasonable
14 application of, clearly established Federal law, as determined by the Supreme Court of the United
15 States” or was “based on an unreasonable determination of the facts in light of the evidence
16 presented in the State court proceeding.” 28 U.S.C. § 2254(d).

17 “Clearly established Federal law” refers to the holdings, as opposed to the dicta, of the
18 Supreme Court’s decisions. See Carey v. Musladin, 127 S.Ct. 649, 653 (2006). A state-court
19 decision is “contrary to” clearly established Supreme Court precedent if the decision “contradicts
20 the governing law set forth in [Supreme Court] cases.” Williams v. Taylor, 529 U.S. 362, 405
21 (2000). A state-court decision is an “unreasonable application” of federal law “if the state court
22 identifies the correct governing legal rule from [the Supreme] Court’s cases but unreasonably
23 applies it to the facts of the particular state prisoner’s case.” Id. at 407. A federal court reviewing
24 a habeas petition must be convinced that the state court’s decision is “more than incorrect or
25 erroneous.” Lockyer v. Andrade, 538 U.S. 63, 75 (2003). The state court’s decision must be
26 “objectively unreasonable.” Id. Federal courts must presume the correctness of the state court’s
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1 factual findings, but Petitioner may rebut the presumption by clear and convincing evidence. 28
 2 U.S.C. § 2254(e)(1).

3 In his objections, Mr. Garnett concedes that Magistrate Judge Benton correctly disposed
 4 of grounds seven, eight, and nine. Mr. Garnett argues that Magistrate Judge Benton erred when
 5 she dismissed grounds one through six.

6 **II. Ground One: Confrontation Clause**

7 Mr. Garnett argues that his wife's tape-recorded statements should not have been
 8 admitted under Ohio v. Roberts, 448 U.S. 56 (1980). In Roberts, the Supreme Court held that
 9 hearsay statements of an unavailable witness are admissible if the statements bear an adequate
 10 "indicia of reliability." Roberts, 488 U.S. at 66. In other words, the statement must fall within a
 11 "firmly rooted hearsay exception" or there must be a showing of a "particularized guarantee of
 12 trustworthiness." Id.

13 The State contends that the Court should apply Crawford v. Washington, 541 U.S. 36
 14 (2004), rather than Roberts despite the Supreme Court's recent ruling in Whorton v. Bockting,
 15 127 S.Ct. 1173 (2007), that Crawford does not apply retroactively on collateral review. The
 16 State cites Lockhart v. Fretwell, 506 U.S. 364, 372 (1993), in which the Supreme Court on
 17 collateral review applied a new rule that was decided after the defendant's conviction was final.
 18 The Court held that the retroactivity rule did not apply to the claims raised by the petitioner. Id.

19 The same proposition advocated by the State in this case was argued and rejected in
 20 Whorton. Indeed, on remand from Whorton, the Ninth Circuit applied Roberts rather than
 21 Crawford to the petitioner's habeas claim. See Bockting v. Bayer, 505 F.3d 973 (9th Cir. 2007).
 22 Other district courts within the Ninth Circuit have also applied Roberts when the petitioner's
 23 conviction was final before Crawford was decided. See e.g., Rivas v. Ryan, 2007 WL 1972212,
 24 at *8 (S.D. Cal. June 20, 2007) (concluding that because "Petitioner's appeal was decided in
 25 1996, and Crawford was decided in 2004, Crawford does not apply to Petitioner's case" and
 26 instead "the test in Ohio v. Roberts . . . controls."); Tevaga v. McGrath, 2007 WL 2572245, at

1 *12 (N.D. Cal. Sept. 5, 2007). Nothing in Whorton suggests that Crawford can be applied on
 2 collateral review in these circumstances. The Court concludes that Roberts applies to the facts
 3 here.

4 At issue are two segments of dialogue between Mr. Garnett's wife and the informant,
 5 Kristine Stafford, referred to as the "laundromat statement" and the "tazer statement."

6 Laundromat statement:

- 7 • Ms. Garnett: (inaudible) Well because time wise, technically you know he
 was only gone 45 minutes to an hour.
- 8 • Ms. Stafford: Oh wow. (inaudible)
- 9 • Ms. Garnett: To do all that. And he to come home all dirty and sweaty,
 but he did. He came home with blood on his jeans.
- 10 • Ms. Stafford: Oh no.
- Ms. Garnett: (inaudible)
- Ms. Stafford: Well, yeah.
- 11 • Ms. Garnett: And I remember saying . . .
- Ms. Stafford: Well that's weird.
- 12 • Ms. Garnett: No it's not nice! And he jumped in the shower and he
 bagged up his clothes. And I go in with the pull-up and
 take them to the laundromat . . .
- 13 • Ms. Stafford: Because, oh . . .
- Ms. Garnett: Put them in the trash can.
- 14 • Ms. Stafford: Oh, at the laundromat. Oh, the one down here on
 Riverside?
- 15 • Ms. Garnett: By Thrifty's
- Ms. Stafford: Oh, okay, yeah
- 16 • Ms. Garnett: I know you'll never repeat this.

17
 18 (Dkt. No. 12, Ex. 2, App. B, Transcript of Tape No. 1.)

19 Tazer statement:

- 20 • Ms. Stafford: I was just curious 'cause Dan I heard was pretty tough.
 He's a big boy actually.
- 21 • Ms. Garnett: I mean I heard he was strong too though.
- 22 • Ms. Stafford: Well he is. He was very strong.
 That's why I was wondering if James hit him, got him from
 behind or what?
- 23 • Ms. Garnett: Well he had a zapper.
- 24 • Ms. Stafford: He should have tested it on a dog or . . .
 Well we were going to test it on somebody. We just
 couldn't get anybody.
- 25 • Ms. Garnett: Fuck, Come here!
- 26 • Ms. Stafford: Josh, Josh called over Little Leroy and . . .
 Uh-huh.

1	• Ms. Garnett:	We were going to do it on him. You know surpri [sic], let me fucking try it on you, I'll pay you 200 bucks.
2	• Ms. Stafford;	Un-huh.
3	• Ms. Garnett:	And he was good . . .
4	• Ms. Stafford:	Uh-huh.
5	• Ms. Garnett:	And then Josh changed his mind or something.
6	• Ms. Stafford:	Fuck.
7	• Ms. Garnett:	I know.
8	• Ms. Stafford:	I used to carry one of those for protection. My brother, like I said, turned up the amp though so it fucking didn't just hurt him it'd knock him out.
9	• Ms. Garnett:	Yuhhh.
10	• Ms. Stafford:	Where did you guys get it at, Northern Sales?
11	• Ms. Garnett:	We bought it up in Bellingham.
12	• Ms. Stafford:	Really?
13	• Ms. Garnett:	At that shop up there.
14	• Ms. Stafford:	(inaudible)
15	• Ms. Garnett:	A gun shop or whatever it is.
16	• Ms. Stafford:	Oh really. I thought, you used to have to go to like the Army Surplus to get 'em.
17	• Ms. Garnett:	Yeah, well the only place we could find them was (inaudible).
18	• Ms. Stafford:	They have them here at the . . .
19	• Ms. Garnett:	We ended up stealing it as a matter of fact.
20	• Ms. Stafford:	Oh really.
21	• Ms. Garnett:	Yeah, out of the store. Yeah.

15 (Id., Transcript of Tape No. 7.)

16 Analyzing her statements under Roberts, the Washington Court of Appeals concluded that
 17 Ms. Garnett's statements were admissible because the statements fell within a firmly-rooted
 18 hearsay exception — they were statements against penal interest. See Fed. R. Evid. 804(3)(b).
 19 The Supreme Court has not addressed the issue of whether a statement against interest made by
 20 an accomplice in a private setting falls within a firmly rooted hearsay exception. See Padilla v.
 21 Terhune, 309 F.3d 614, 618 (9th Cir. 2002). Magistrate Judge Benton concluded that the
 22 statements were reliable, not under a firmly rooted hearsay exception, but under the Roberts'
 23 trustworthiness doctrine. Magistrate Judge Benton concluded that the statements were
 24 sufficiently trustworthy because Ms. Garnett made the statements in private to a friend without
 25 mitigating her own role in the crime. (R&R at 14.)

26 Mr. Garnett argues that Magistrate Judge Benton incorrectly applied Padilla in concluding
 27

1 that the statements met the Roberts reliability requirement. In Padilla, the Ninth Circuit held that
2 “when an accomplice makes a statement incriminating the defendant in private, to a friend,
3 without mitigating his own role in the crime, the circumstances surrounding the statement provide
4 a particularized guarantee of trustworthiness.” Padilla, 309 F.3d at 618-19 (citing United States v.
5 Boone, 229 F.3d 1231, 1234 (9th Cir. 2000)) (internal quotations omitted). But even if such
6 circumstances exist, Padilla still requires a court to consider the entirety of the circumstances
7 under which a statement was made in order to determine whether it is so reliable that cross-
8 examination is unnecessary. Padilla, 309 F.3d at 619. Mr. Garnett asserts that Magistrate Judge
9 Benton failed to do this fact specific analysis and instead concluded that because certain
10 circumstances existed — the statements were made in private, to a friend, without minimizing her
11 own role — Ms. Garnett’s statements were *per se* trustworthy.

12 Mr. Garnett argues that the reliability of Ms. Garnett’s statements is diminished because
13 Ms. Garnett had a motive to lie to Ms. Stafford and minimized her role in the crime. He contends
14 that she knew she was being investigated for the murder and suspected the police were listening
15 to her conversations. He points out that the trial court recognized that Ms. Garnett was
16 “essentially putting all of the blame and most blame on James Garnett and saying [she] had a very
17 peripheral role here.” (Dkt. No. 12, Ex. 25 at 17.) But the trial court was referring to other
18 statements made by Ms. Garnett that it found to be unreliable and inadmissible.² (*Id.* at 19.)

In the “tazer” statement, Ms. Garnett does not minimize her role — she admits to crimes of rendering criminal assistance and petty theft. (*Id.*, Ex. 5 at 7-8.) In terms of the “laundromat” statement, taken alone, a discussion of washing blood off Mr. Garnett’s jeans is not a discussion of criminal activity. But combined with her request that Ms. Stafford “never repeat this,” Ms.

2 Mr. Garnett argues that the Court should consider Ms. Garnett's other statements that
24 were not admitted at trial. (Dkt. No. 20 at 10.) But as Mr. Garnett himself points out, the "court
25 should consider only the inherent trustworthiness of the hearsay statement without reference to other
26 evidence." (*Id.* at 8)(citing *Idaho v. Wright*, 497 U.S. 805 (1990)). The Court will consider only
27 the statements that are at issue.

1 Garnett's statement indicates that she trusted Ms. Stafford and that Ms. Garnett was participating
2 in criminal activity.

3 Mr. Garnett also argues that Ms. Garnett had a motive to lie to Ms. Stafford because Ms.
4 Garnett was addicted to meth and heroine and depended on Ms. Stafford for her drugs. But Ms.
5 Garnett had limited incentive to please Ms. Stafford because Ms. Garnett could get the drugs for
6 herself. The evidence showed that she was using drugs before she met Ms. Stafford — she was
7 suffering withdrawals from her meth and heroine addiction at the time Ms. Stafford met her in jail.
8 (*Id.*, Ex. 13, Appx. 4 at 3.) Ms. Stafford also testified that she never gave Ms. Garnett money for
9 drugs and that sometimes Ms. Garnett supplied the drugs on which they got high. (*Id.*, Ex. 33 at
10 1210.) Ms. Stafford also testified that she never said that Ms. Garnett needed her assistance to
11 obtain drugs. (*Id.* at 1211.) Ms. Garnett went through Ms. Stafford's "connections" because it
12 was "easier," not impossible, for Ms. Garnett to obtain the drugs. (*Id.* at 1212.) Mr. Garnett's
13 argument that Ms. Garnett's statements are unreliable because she had a motive to lie to Ms.
14 Stafford for drugs is not persuasive.

15 Mr. Garnett also contends that her statements are unreliable because Ms. Garnett was high
16 at the time she made the statements. This allegation, even if true, does not undermine the
17 reliability of her statements. Her statements are coherent — she follows along in the conversation
18 without issue. Whether she is a drug addict and was high at the time of her statements are
19 credibility issues for the jury to consider.

20 Because Ms. Garnett (1) made her statements to a friend in private without minimizing her
21 own role, (2) did not have an incentive to lie to Ms. Stafford, (3) implicated herself in a crime, and
22 (4) did not want her statements repeated, Ms. Garnett's statements are sufficiently reliable such
23 that their use at trial did not violate the Confrontation Clause. Accordingly, Mr. Garnett's request
24 for habeas relief based on his first ground is DENIED.

25 **III. Ground Two: Physical Restraints**

26 Mr. Garnett challenges the trial court's decision to force him to wear a knee brace under

1 his pant leg in front of the jury. The knee brace altered his gait causing him to walk as though his
 2 knee were stiff. Magistrate Judge Benton concluded that although the trial court did not set forth
 3 an adequate factual basis for its decision to restrain Mr. Garnett, the state courts properly rejected
 4 his challenge on this ground because: (1) the restraint was not visible to the jury and (2) it is
 5 unlikely the jury knew he was restrained.

6 In his objections, Mr. Garnett argues that the trial court abused its discretion when it did
 7 not provide an adequate factual basis to conclude that the restraints were necessary and when it
 8 allowed the jury to see the “effect of the restraint.” Mr. Garnett argues that the use of the
 9 restraints violates Deck v. Missouri, 544 U.S. 622, 629 (2005), in which the Supreme Court held
 10 that the use of physical restraints visible to the jury, absent a trial court determination that they are
 11 justified by a state interest specific to a particular trial, violates due process. At a minimum, Mr.
 12 Garnett requests an evidentiary hearing to determine whether the jurors knew he was restrained.

13 Deck is not applicable here because Mr. Garnett’s knee brace was not visible to the jury.³
 14 Deck dealt with a situation in which the defendant’s shackles were visible to the jury. Mr. Garnett
 15 does not assert that the leg restraint itself was visible to the jury. Instead, Mr. Garnett argues that
 16 a due process violation can occur when a defendant is forced to wear a leg brace under his pants,
 17 citing Packer v. Hill, 291 F.3d 569 (9th Cir. 2002). But the court in Packer actually found that
 18 habeas relief was not warranted because “[n]one of the jurors who were interviewed after trial
 19 remembered seeing the leg brace on Packer.” Id. at 583 (emphasis added). Mr. Garnett does not
 20 cite to any authority suggesting that due process is violated when a jury sees only the “effect of
 21 the restraints.” In fact, Deck suggests that concealed shackles are not problematic. See 544 U.S.
 22 at 634-635 (noting that the trial court did not explain “why, if shackles were necessary, [the trial
 23 court] chose not to provide for shackles that the jury could not see”).

24 Because Mr. Garnett’s restraints were not visible to the jury and because Mr. Garnett
 25

26 ³ Because the Court concludes that Deck is distinguishable, the Court need not consider
 27 whether Deck can be applied retroactively.

1 offers no support for his argument that the visibility of the effect of the restraint violates due
2 process, the Court concludes that Mr. Garnett was not denied a fair trial when he was forced to
3 wear a knee brace under his pant leg. His request for habeas relief based on this second ground is
4 DENIED.

5 **IV. Ground Three: Right to Counsel**

6 Mr. Garnett challenges the trial court's decision to admit a letter that he wrote to his wife
7 in which he makes reference to his attorney. The prosecutor argued that the letter was indicative
8 of guilt, which Mr. Garnett claims violated his right to counsel. Mr. Garnett argues that the
9 prosecutor insinuated that his hiring of an attorney was probative of guilt. See Bruno v. Rushen,
10 721 F.2d 1193, 1194 (9th Cir. 1983) (holding that defendant's right to counsel was violated when
11 prosecutor directly attacked the accused's claim of innocence by openly hinting to the jury that
12 the accused's hiring of counsel was in some way probative of his guilt).

13 Magistrate Judge Benton correctly concluded that the state courts reasonably rejected Mr.
14 Garnett's claim. As the State points out, the prosecutor's comment regarding the letter was not
15 focused on Mr. Garnett's hiring of counsel. Rather, the letter was reflective of Mr. Garnett's
16 state of mind – he was bullying and pressuring his wife, and he suggested that his attorney would
17 help him get away with something. Accordingly, the admission of Mr. Garnett's letter did not
18 violate his right to counsel. Mr. Garnett's request for habeas relief based on this third ground is
19 DENIED.

20 **V. Ground Four: Prosecutorial Misconduct**

21 Mr. Garnett asserts that prosecutorial misconduct prohibited him from obtaining a fair
22 trial. He argues that one of the prosecutor's questions was so egregious that it cannot be
23 presumed that the jury followed the trial court's instruction to disregard it. The prosecutor asked
24 Mr. Garnett's mother the following series of questions regarding the tape-recorded statements
25 made by Ms. Garnett:

26 Q: Are you aware that your daughter-in-law described how your son killed
27 Mr. Diorio?

1 A: No.
2 Q: You weren't aware of that?
3 A: No.

4 The trial court agreed with Mr. Garnett that there were no such statements on the tapes
5 and the prosecutor's question amounted to misconduct. The trial court instructed the jury to
6 disregard the "last question." The court of appeals concluded, and Magistrate Judge Benton
7 agreed, that Mr. Garnett offered no evidence or arguments to support his assertion that the
instruction was inadequate to cure the prosecutor's conduct.

8 In his objections, Mr. Garnett essentially repeats his argument that the instruction could
9 not cure the misconduct. The general rule is that juries are presumed to follow court instructions.
10 Weeks v. Angelone, 528 U.S. 225, 234 (2000). But in Bruton v. United States, 391 U.S. 123,
11 137 (1968), the Supreme Court held that curative instructions are insufficient to overcome
12 prejudicial statements in certain circumstances.

13 Given the nature of the evidence presented and the gravity of the prosecutor's comment, it
14 is unlikely that the jury followed an instruction to disregard a statement suggesting that Mr.
15 Garnett confessed to the murder. See Bruton v. United States, 391 U.S. at 137 (concluding that
16 "[d]espite the concededly clear instructions to the jury to disregard . . . inadmissible hearsay
17 evidence inculpating petitioner . . . [t]he effect is the same as if there had been no instruction at
18 all."); see also Jackson v. Denno, 378 U.S. 368, 385 n. 12 (1964) (concluding that "[r]egardless
19 of explicit instructions . . . we think the likelihood that these forbidden considerations enter the
20 jury's deliberations too great for us to ignore."). As the trial court noted, the jury was left with
21 the impression that somewhere in the tapes Ms. Garnett described how Mr. Garnett killed the
22 victim, even though no such description existed. (Dkt. No. 12, Ex. 35 at 1405.) The jury was left
23 to speculate about whether there were other recorded statements that, for reasons unknown to the
24 jury, were not provided to them. Moreover, the fact that this case was tried entirely on indirect
25 evidence makes the prosecutor's statement all the more prejudicial and difficult to cure. No
26 physical forensic evidence or live witnesses directly indicated that Mr. Garnett killed the victim.

1 Further, the trial court's instruction to the jury was not adequate to cure the misconduct.
 2 The instruction was inadequate because it was directed at the wrong question — “You weren't
 3 aware of that?” — rather than the actually prejudicial question — “Are you aware that your
 4 daughter-in-law described how your son killed Mr. Diorio?” — that preceded the last question.
 5 Thus, even if the court correctly presumed that the jury followed the trial court's instruction, that
 6 instruction did not actually address the prejudicial question. The prosecutor's misconduct made it
 7 imperative that the trial court adequately instruct the jury regarding what they specifically needed
 8 to disregard. The Court will not assume that the jury understood that they were meant to
 9 disregard the prejudicial question. The court of appeals' presumption that the jury disregarded
 10 the prosecutor's statement is an unreasonable determination of the facts in light of the evidence
 11 presented. Habeas relief is warranted under 28 U.S.C. § 2254(d)(2).

12 **VI. Ground Five: Government Misconduct**

13 Mr. Garnett asserts a Brady violation,⁴ arguing that he was deprived due process as a
 14 result of prosecutorial misconduct and mismanagement of the case. At trial, he filed a motion to
 15 dismiss under Criminal Rule (CrR) 8.3(b), which provides in part:

16 The Court . . . may dismiss any criminal prosecution due to arbitrary action or
 17 governmental misconduct where there has been prejudice to the rights of the accused
 which materially affect the accused's rights to a fair trial

18 Magistrate Judge Benton concluded that Mr. Garnett failed to state a cognizable claim for
 19 federal habeas relief on this ground because he contested a decision made under a state procedural
 20 rule rather than a constitutional rule. Mr. Garnett disputes this conclusion and he points to
 21 sections of the record where he asserted that the State's conduct amounted to a Brady violation.

22 In his motion to dismiss at trial, Mr. Garnett requested relief under the Fourth Amendment
 23 of the U.S. Constitution and Article I, Section 7 of the Washington Constitution in addition to

24

25 ⁴ In Brady v. Maryland, the Supreme Court held “that the suppression by the
 26 prosecution of evidence favorable to an accused upon request violates due process where the
 27 evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the
 prosecution.” 373 U.S. 83, 87 (1963).

1 CrR 8.3. (Dkt. No. 12, Ex. 13 at Appx. 3a.) In his brief to the court of appeals, he argued that
2 the trial court's denial of his motion to dismiss was an abuse of discretion because his "right to
3 due process of law and fair trial, secured by both state and federal constitutions," was violated.
4 (Id., Ex. 13 at 5.) The record shows that Mr. Garnett adequately preserved his fifth ground for
5 relief by raising the constitutional issue regarding prosecutorial misconduct.

6 Mr. Garnett asserts that the State withheld information about the benefits Ms. Stafford
7 received in exchange for her assistance and testimony. He claims that when his defense attorney
8 specifically asked about these issues, the State indicated that it had only quashed four warrants for
9 Ms. Stafford. But he contends that Ms. Stafford actually received more benefits than the State
10 disclosed. He claims that in addition to quashing the warrants, she was given the following
11 benefits:

- 12 1) She received a \$5,000 reward for her assistance related to the victim's
13 disappearance;
14 2) She avoided being extradited to Montana for a period of time;
15 3) She was allowed to participate in drug court despite criminal history and dirty
16 4) She received concessions for additional felony offenses.

17 Mr. Garnett alleges that the State's investigator was facilitating the \$5,000 payment to
18 Ms. Stafford at the time of trial. Mr. Garnett contends that because the prosecutor failed to
19 disclose this information, his defense counsel was unable to attack Ms. Stafford's credibility and
20 the reliability of her statements and the State was able to defend her credibility in closing
21 argument. The parties dispute whether at the time of trial the State knew of additional benefits to
22 be provided to Ms. Stafford with the State's assistance. At a minimum, Mr. Garnett requests an
23 evidentiary hearing to inquire as to the full extent and timing of benefits Ms. Stafford received
24 from the State.

25 It is not clear from the record or from the parties' briefs whether the State investigator
26
27

1 knew prior to, or during, trial that Ms. Stafford would receive the \$5,000 reward.⁵ It is also
 2 unclear from the record whether the State failed to disclose to defense counsel the additional
 3 information received by Ms. Stafford.

4 “In deciding whether to grant an evidentiary hearing, a federal court must consider
 5 whether such a hearing could enable an applicant to prove the petition’s factual allegations,
 6 which, if true, would entitle the applicant to federal habeas relief.” Schriro v. Landigan, 127 S.
 7 Ct. 1933, 1940 (2007). As a general rule, an evidentiary hearing is not warranted if the petitioner
 8 failed to develop the factual basis of the claim in the State court proceedings. 28 U.S.C. §
 9 2254(e)(2). But even if a petitioner has failed to develop a factual basis, the Court may grant an
 10 evidentiary hearing if the claim relies on “a factual predicate that could not have been previously
 11 discovered through the exercise of due diligence” and “the facts underlying the claim would be
 12 sufficient to establish by clear and convincing evidence that but for constitutional error, no
 13 reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C.
 14 § 2254(e)(2)(A) & (B).

15 The Court finds that these exceptions to the general rule are met in this case. Whether the
 16 State knew about additional benefits received by Ms. Stafford are factual predicates that could not
 17 have been discovered earlier. Further, because Ms. Stafford was the State’s key witness and the
 18 conviction was based on entirely circumstantial evidence, it is reasonable to conclude that the
 19 State’s withholding of this information would be prejudicial. The Court concludes that an
 20 evidentiary hearing is warranted on the issue of whether the State knew Ms. Stafford received
 21 additional benefits and whether this information was withheld from the defense.

22 Mr. Garnett also contends that the State failed to make Ms. Stafford available to interview
 23

24 ⁵ Mr. Garnett cites to evidence in the record that he believes shows that the State knew
 25 Ms. Stafford was going to get paid the reward. But he cites to exhibits more than 100 pages long
 26 without pointing to a specific location in the record. As far as the Court can ascertain from the
 27 voluminous documents cited by Mr. Garnett, nothing proves his assertion that the State’s private
 investigator was facilitating a payment to Ms. Stafford at the time of trial.

1 and did not provide her correct address until after trial began. (Dkt. No. 12, Ex. 13 at 9.) The last
 2 witness list filed on July 20, 2000, stated that Ms. Stafford lived in Sedro Woolley, Washington,
 3 when in fact she was in Michigan at the time. But as the trial court found, the State made every
 4 effort to keep the defense apprised of where she was residing. It is not disputed that Ms. Stafford
 5 moved several times in the course of these proceedings, whether she was going home to Michigan
 6 or traveling in Montana. The record shows that the prosecution attempted to set up a phone
 7 interview with defense counsel while Ms. Stafford was in Michigan. (*Id.*, Ex. 33 at 1025.) When
 8 the State learned Ms. Stafford was arrested in Montana, the State provided a copy of the warrant
 9 to defense counsel in discovery. (*Id.* at 1024.) When Ms. Stafford was about to get out of jail,
 10 the State provided the defense a copy of the plane tickets and itinerary so defense counsel would
 11 know when Ms. Stafford would arrive in Washington. (*Id.*) When Ms. Stafford went on vacation,
 12 the State e-mailed the information to defense counsel. (*Id.*, at 1025.) The record also suggests
 13 that the defense counsel had several opportunities to interview Ms. Stafford prior to trial. (*Id.* at
 14 1013-14.)

15 Mr. Garnett's contention that the State withheld Ms. Stafford's drug use at the time she
 16 wore the wire is also without merit. As the trial court found, the recorded conversations between
 17 Ms. Stafford and Ms. Garnett referred to items that would lead a reasonable person to conclude
 18 that they were using drugs during the time in question. (*Id.* at 1046.) Detectives were concerned
 19 that Ms. Stafford was using drugs and asked her 15 to 20 times whether she was using drugs.
 20 (*Id.*). Ms. Stafford admits that she hid her drug use from detectives and wore long-sleeved shirts
 21 so they would not see the evidence of her drug use. (*Id.*)

22 When detectives found out Ms. Stafford was using drugs, a lengthy detailed report was
 23 prepared regarding the encounter. The trial court found that this report had been available to
 24 defense counsel for many months prior to trial. (*Id.*) Even Mr. Garnett's defense counsel
 25 conceded to the trial court that Ms. Stafford's use of drugs was suspected by all parties:

26 It is not the fact that she was using drugs or that Ms. Stafford, they were using
 27 drugs. We all suspected that. The police officer suspected that. They suspected

1 there was rampant drug use. . . .

2 (*Id.*, Ex. 33 at 1037.) The Court concludes that the trial court's decision was reasonable that the
3 State did not withhold Ms. Stafford's drug use information.

4 Because it appears that Ms. Stafford was made available to the defense prior to trial, the
5 State made reasonable efforts to keep defense counsel apprised of her whereabouts, and the
6 State did not withhold information about Ms. Stafford's drug use, the trial court's conclusion
7 regarding these issues is reasonable. But because it is not clear whether the State withheld
8 information regarding benefits Ms. Stafford received, the Court concludes that an evidentiary
9 hearing is necessary to further develop the record.

10 Nevertheless, the Court will not schedule an evidentiary hearing at this time. Two other
11 grounds warrant habeas relief. The Court need not expend valuable time and scarce judicial
12 resources conducting an evidentiary hearing on one ground where other grounds provide for the
13 same relief. Robbins v. Smith, 152 F.3d 1062, 1068-69 (9th Cir. 1997), rev'd on other grounds,
14 528 U.S. 259 (2000); Rice v. Wood, 44 F.3d 1396, 1402 n.10 (9th Cir. 1995), vacated in part on
15 other grounds, 77 F.3d 1138 (9th Cir. 1996); Blazak v. Ricketts, 971 F.2d 1408, 1413-14 (9th
16 Cir. 1992).

17 **VII. Ground Six: Erroneous Jury Instruction**

18 Mr. Garnett asserts that the trial court, in instructing the jury, violated his due process
19 rights because the State was relieved of its burden of proving every element of the crime beyond a
20 reasonable doubt. Mr. Garnett was charged with aggravated first degree murder and first degree
21 felony murder. He takes issue with the instruction's description of the alternative offenses that
22 the jury could consider in order to find him guilty. The challenged instruction stated as follows:

23 If you find from the evidence that each and every element of "A" [premeditated
24 murder in the first degree] or "B" [felony murder in the first degree], or "A" and
25 "B", has been proved beyond a reasonable doubt, then it will be your duty to
26 return a verdict of guilty to the charge of murder in the first degree. The elements
27 in "A" and "B" are alternatives. To return a verdict of guilty, all twelve jurors
need not agree as to which alternative, "A" or "B" has been proved beyond a
reasonable doubt. However, each juror must find that all the elements in either
"A" or "B" exist beyond a reasonable doubt.

1 On the other hand, if after weighing the evidence, you have a reasonable doubt as
 2 to any element in “A” and a reasonable doubt as to any element in “B” then it will
 3 be your duty to return a verdict of not guilty to the charge of murder in the first
 4 degree.

5 (Dkt. No. 12, Ex. 15, Appx. C, Instruction No. 8 (emphasis added)). The jury returned a special
 6 verdict finding Mr. Garnett guilty of premeditated murder and not felony murder.

7 The court of appeals concluded that although it was “inartfully worded,” the challenged
 8 instruction was not an erroneous statement of law. The Supreme Court Commissioner agreed and
 9 further noted that if the statement was erroneous, Mr. Garnett invited the error. Magistrate Judge
 10 Benton concluded that the state appellate courts properly rejected this claim, reasoning that the
 11 challenged instruction, when read in conjunction with the special verdict forms, comports with
 12 due process. Special Verdict Form A provided:

- 13 1. Were you able to unanimously agree beyond a reasonable doubt that the defendant,
 14 James Garnett, committed premeditated murder in the first degree?
 15 (Alternative A in INSTRUCTION NO. 8)
 16 [] Yes [] No

17 *If you answered “yes” to Special Verdict Question 1, please complete “Special
 18 Verdict Form B.” If you answered “no,” you do not need to complete “Special
 19 Verdict Form B.”*

20 (Dkt. No. 12, Ex. 15, Appx. E.) The jury answered “Yes” to the question presented in Special
 21 Verdict Form A and proceeded to Special Verdict Form B. Special Verdict Form B asked the
 22 jury to make findings regarding aggravating circumstances and began with the following
 23 language:

24 We, the jury, having found the defendant guilty of premeditated murder in the first
 25 degree (Alternative A) as charged in the information, make the following answers to
 26 the questions submitted by the court.

27 (Id., Appx. F.) The jury answered “Yes” to the questions presented in Special Verdict Form B
 28 finding that the State had proved the existence of aggravating circumstances beyond a reasonable
 29 doubt. (Id.)

30 Before a state court conviction can be overturned based on an erroneous jury instruction,
 31 a petitioner must establish “not merely that the instruction is undesirable, erroneous, or even
 32 manifestly unfair, but that it is so wantonly manifestly unfair as to deprive the defendant of
 33 due process of law.” *Strickland v. Washington*, 464 U.S. 668, 687 (1984).

1 ‘universally condemned,’ but that it violated some right which was guaranteed to the defendant by
 2 the Fourteenth Amendment.” Cupp v. Naughten, 414 U.S. 141, 146 (1973). The Supreme Court
 3 has held that a single instruction to a jury may not be judged in artificial isolation, but must be
 4 viewed in the context of the overall charge. Id. at 146-47. Federal habeas courts are not to
 5 reexamine state court conclusions regarding matters of state law. Estelle v. McGuire, 502 U.S.
 6 62, 67-68 (1991). A jury instruction violates the due process guarantees of the Fourteenth
 7 Amendment if it relieves the state of its burden to prove every element of the charged offense
 8 beyond a reasonable doubt. Carella v. California, 491 U.S. 263, 265 (1989).

9 **A. Challenged Jury Instruction**

10 Mr. Garnett argues that the challenged instruction is a misstatement of the law because it
 11 does not require the jury to unanimously agree on which of the alternative offenses (premeditated
 12 or felony murder) was proved beyond a reasonable doubt, essentially allowing the jury to mix and
 13 match the elements of each charge. He points out that the jury instruction was derived from
 14 instructions in which there were alternative means of committing the charged offense, rather than
 15 alternative offenses, as in this case.

16 Despite the findings of the state appellate courts and deference given to such courts
 17 regarding matters of state law, the challenged instruction is unequivocally wrong. Aggravated
 18 first degree murder and felony murder are two different offenses, with different statutory
 19 elements. See RCW 10.95.020 (aggravated first degree murder is based only on premeditated
 20 intentional murder). They are not different means of committing the same offense. See State v.
 21 Meas, 118 Wn. App. 297, 302-03 (2003). The jury was therefore required to unanimously agree
 22 that the State proved all the elements of at least one of the alternative offenses (aggravated or
 23 felony) beyond a reasonable doubt.

24 The challenged instruction relieves the State of its burden. The state appellate courts
 25 incorrectly concluded that the “jury could not have reasonably misread the instruction allowing it
 26 to ‘mix and match’ elements of the two alternatives to reach a hybrid verdict.” That outcome is

1 exactly what the instruction invites the jury to do: "To return a verdict of guilty, all twelve jurors
2 need not agree as to which alternative, "A" or "B" has been proved beyond a reasonable doubt."
3 (Dkt. No. 12, Ex. 15, Appx. C, Instruction No. 8 (emphasis added)).

4 **B. Jury Instructions as a Whole**

5 The Court must still consider the challenged instruction within the context of the
6 instructions and the trial record as a whole. See Estelle, 502 U.S. at 72 (citing Cupp, 414 U.S. at
7 147). Mr. Garnett insists the special verdict forms do not cure the incorrect instruction.

8 The jury returned a general verdict of guilty to the charge of murder in the first degree.
9 Special Verdict Form A asks the jury if they were unanimous as to premeditated murder. Mr.
10 Garnett points out that unlike Washington Pattern Instructions – Criminal ("WPIC") 4.25 and
11 190.9, Special Verdict Form A does not instruct the jury that two alternative offenses are actually
12 separate crimes and that the jury must decide them separately. Nor does the verdict form inform
13 the jury that to convict Mr. Garnett of either offense, the state must prove each and every element
14 of the offense and that the jury must unanimously agree that all the elements of the offense were
15 proved. Mr. Garnett also points out that the jury was not instructed that in order to answer the
16 special verdict form "yes," that the jury must unanimously be satisfied beyond a reasonable doubt
17 that "yes" is the correct question, even though that language is standard in WPIC 160.00. Mr.
18 Garnett claims that the record does not show whether the jury based its general verdict of guilt for
19 first degree murder on a unanimous decision regarding aggravated premeditated murder.

20 The Court agrees with Mr. Garnett and concludes that even when read as a whole, the
21 jury instruction relieved the State of its burden to prove every element of the charged offense
22 beyond a reasonable doubt. Although Special Verdict Form A requires that the jury answer
23 whether or not they "unanimously" agreed beyond a reasonable doubt that Mr. Garnett committed
24 "premeditated murder in the first degree," the challenged instruction instructs the jury that they
25 can disagree on which alternative offense has been proved beyond a reasonable doubt. The jury
26 could then assume that they could answer "yes" on Special Verdict Form A even though all
27

twelve jurors did not agree that Mr. Garnett committed premeditated murder.

The Court further concludes that the Washington Supreme Court erred when it determined that Mr. Garnett invited the instructional error by presenting a "to convict" instruction statement that the elements in 'A' and 'B' are alternatives. It was the State, not Mr. Garnett, who proposed the erroneous language. (See Dkt. No. 12, Ex. 15, Appx. H.) Mr. Garnett actually proposed a correct instruction that instructed the jury that they "must be unanimous as to whether that alterative is proved by evidence beyond a reasonable doubt." (Id. Appx. I.) Mr. Garnett did not invite the error.

9 Accordingly, the erroneous jury instructions relieved the State of its burden to prove every
10 element of the offense beyond a reasonable doubt in violation of the Fourteenth Amendment.

¹¹ Habeas relief on this ground is warranted under 28 U.S.C. § 2254(d).

CONCLUSION

13 Petitioner James Garnett raised six grounds for relief in his habeas petition. Although
14 grounds one through three do not have merit, the Court concludes that grounds four and six
15 warrant habeas relief. With respect to Mr. Garnett's fifth ground for relief, the Court finds that
16 there are gaps in the record necessitating an evidentiary hearing, but concludes that it need not
17 hold an evidentiary hearing at this time. The Court therefore ADOPTS IN PART and
18 DECLINES TO ADOPT IN PART Magistrate Judge Benton's Report & Recommendation. The
19 Court GRANTS James Garnett's habeas petition. Mr. Garnett's conviction in Skagit County
20 Superior Court Case No. 99-1-00636-3 is VACATED.

21 The Court further orders that the execution of this order shall be STAYED for thirty (30)
22 days. The STAY shall remain in effect until **February 25, 2008**. The clerk is directed to send a
23 copy of this order to all counsel of record and to Magistrate Judge Benton.

24 DATED: January 24th, 2008.


Marsha J. Pechman
United States District Judge